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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1106.

IRA B. ARNSTEIN,

*Petitioner,*

—against—

COLE PORTER,

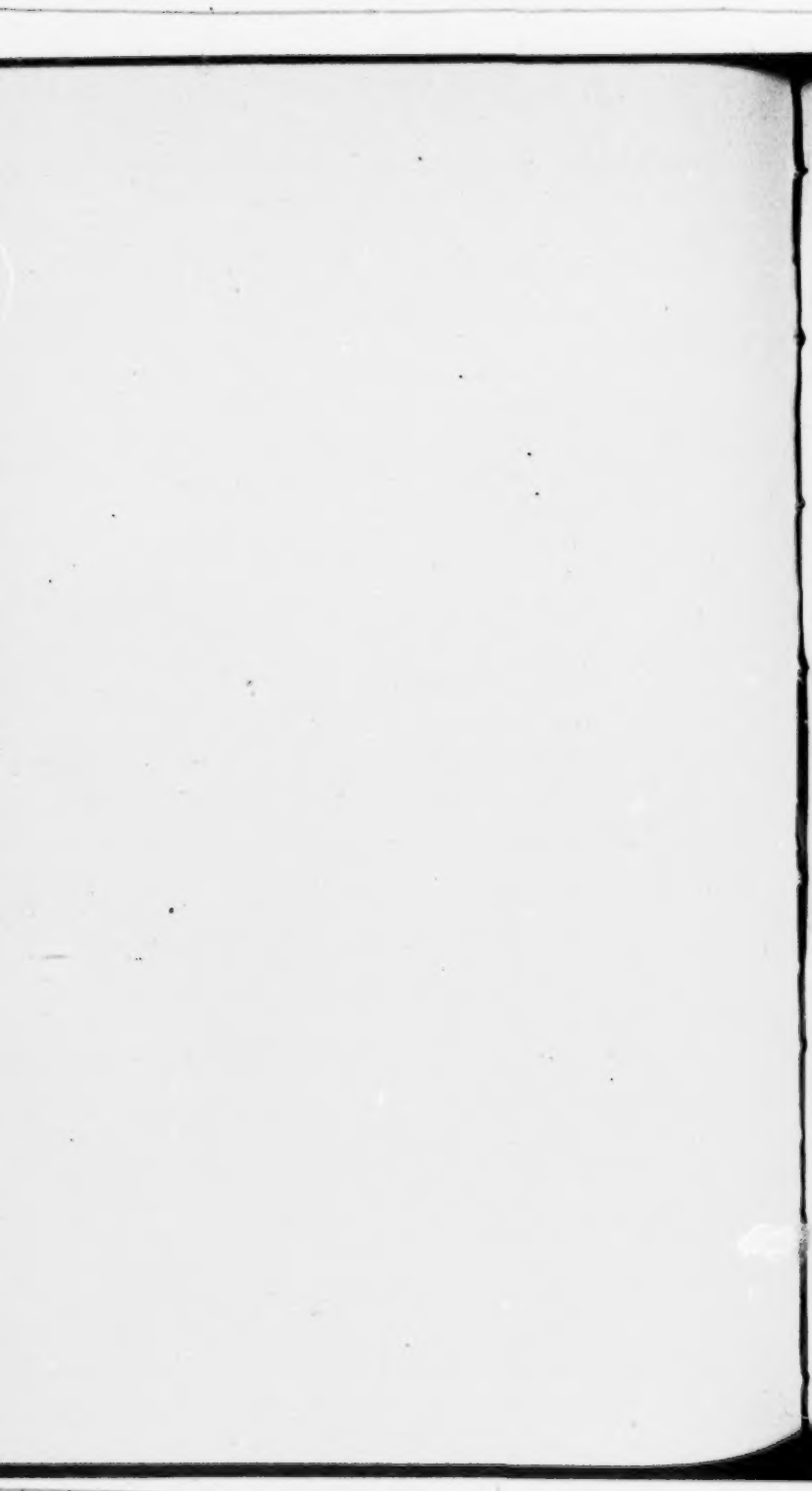
*Respondent.*

*petition not  
printed*

RESPONDENT'S BRIEF IN OPPOSITION.

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Dated: March 27, 1947.



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# Supreme Court of the United States

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IRA B. ARNSTEIN,

*Petitioner,*

—against—

COLE PORTER,

*Respondent.*

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## RESPONDENT'S BRIEF IN OPPOSITION.

### Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 158 F. (2d) 795. The opinion of that Court on a previous appeal is reported at 154 F. (2d) 464.

### Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on January 30, 1947. The petition for writ of certiorari was filed on March 7, 1947. Jurisdiction to hear and determine the petition for certiorari is provided in 28 U. S. C., Section 347(a).

### Statement of Case.

The action is at law for alleged infringement of copyright in the music of certain songs.

Petitioner was plaintiff, and respondent was defendant, in the District Court.

The case was tried before a jury in the United States District Court for the Southern District of New York. The jury brought in a verdict for defendant-respondent (Record 292). The United States District Court for the Southern District of New York thereupon entered a final judgment dated June 3, 1946 dismissing the action (Record 292).

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the judgment (Record 296).

Petitioner is now asking certiorari to review this judgment.

The following causes of action were submitted to the jury:

CAUSE OF ACTION	PETITIONER'S SONG	RESPONDENT'S SONG
First	A Modern Messiah	Don't Fence Me In
Second	La Priere	I Love You
Third	I Love You Madly and La Priere	Night and Day
Fifth	(a) Sadness Overwhelms My Soul	You'd Be So Nice to Come Home To
	(b) A Mother's Prayer	My Heart Belongs to Daddy

At the trial petitioner was represented by counsel. After the entry of the judgment in the District Court, his counsel withdrew from the case and petitioner prosecuted the appeal to the Circuit Court of Appeals and brings this petition for certiorari without counsel.

### **Summary of Argument.**

No ground for certiorari exists.

Certiorari will not be granted to review the weight of the evidence, particularly where there have been concurrent findings. In fact, the weight of the evidence supports the verdict.

There were no objections to the District Court's charge. The charge was fair.

### **Argument.**

None of the grounds for certiorari specified in Rule 38(5)(b) of this Court exist, and no other ground is suggested.

In petitioner's brief before the Circuit Court of Appeals, the only two remotely relevant matters discussed or urged as error were:

- I. The weight of the evidence.
- II. The Court's charge to the jury.

Petitioner apparently views this application for certiorari as a further appeal on the merits, for he continues to urge these same points, and their rejection by the Circuit Court of Appeals, in support of his petition for writ of certiorari.

We shall discuss each of these briefly.

## I.

**Certiorari will not be granted to review the weight of the evidence, particularly where there have been concurrent findings. In fact, the weight of the evidence supports the verdict.**

(a)

This Court has said that “\* \* \* granting of the writ [of certiorari] would not be warranted merely to review the evidence or inferences drawn from it”, and where the decision on the weight of the evidence rests on concurrent findings “\* \* \* they are not to be disturbed unless plainly without support. \* \* \*” *General Talking Pictures Corporation v. Western Electric Company*, 304 U. S. 175, 178.

(b)

Neither in the Circuit Court of Appeals nor this Court does the record include all the evidence adduced at the trial. There is neither certification nor stipulation that it does include all the evidence. This is further apparent from an examination of the testimony which is included in the record. For example, as to the witness Sigmund Spaeth, there is included only an excerpt from cross examination (Record 208); there is omitted all his direct examination and most of his cross examination. As to petitioner's own testimony, the only excerpts begin with a continuation of cross examination (Record 195). Most of his testimony, both on direct and cross, is omitted. The entire testimony of several witnesses is omitted.

The record also omits all the exhibits introduced in evidence upon the trial, together with most of the testimony as to them. Thus, much of the testimony included in the record is almost unintelligible, since it consists of discussions of the exhibits.

In the absence of a transcript of all the evidence, it is difficult to see how the Circuit Court of Appeals could in any event have held that petitioner's evidence was so strong or so uncontradicted as to require that the District Court override the verdict of the jury.

But even the excerpts from the testimony included in the record demonstrate that there was evidence in respondent's favor which, if believed, would require a verdict for respondent. For example, respondent Porter testified that he never saw or heard of any of petitioner's compositions at any time before the law suit was begun (Record 178); and Deems Taylor, one of respondent's experts, testified that in his opinion there were not such similarities in petitioner's and respondent's music as to require an inference of copying, and indeed, that there were no substantial similarities in the music (Record 255 ff.).

## II.

**There were no objections to the District Court's charge. The charge was fair.**

Although petitioner was represented by counsel at the trial, no objection was made by petitioner or his counsel to the portions of the charge here complained

of. Rule 51 of the Federal Rules of Civil Procedure provides:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

No such objection was made in the case at bar. At the close of the Court's charge the following colloquy took place (Record 26):

"The Court: Are there any exceptions counsel wish to take?

Mr. Greenblatt [plaintiff's counsel]: I have none, your Honor."

The only exceptions were to the denial of certain requests to charge, and as to those, petitioner raised no objection either in the Circuit Court of Appeals or in this Court.

The failure to make objection to the charge is, of course, fatal. And in any event the charge was fair and free from error.

So far as we can tell, petitioner is objecting to the fact that the District Court charged the jury in effect that in copyright infringement cases there are two issues:

(1) Did defendant actually copy plaintiff's work?

(2) If he did, did the copying go so far as to constitute an unfair use?

Petitioner does not suggest why this charge is erroneous or what the correct rule of law is.

The rule as charged by the District Court is perfectly well settled, and there is no dispute among the Circuits as to it.

*Arnstein v. Porter*, 154 F. (2d) 464 (C. C. A. 2);  
*Arnstein v. Marks*, 82 F. (2d) 275 (C. C. A. 2);  
*Becker v. Loew's, Inc.*, 133 F. (2d) 889, 892 (C. C. A. 7), e. d. 319 U. S. 772;  
*Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F. (2d) 893 (C. C. A. 8), e. d. 91 L. Ed. \*37 (Oct. 14, 1946);  
*Christianson v. West Pub. Co.*, 149 F. (2d) 202 (C. C. A. 9);  
*Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F. (2d) 73, 84-85 (C. C. A. 6);  
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*Darrell v. Joe Morris Music Co., Inc.*, 113 F. (2d) 80 (C. C. A. 2);  
*Wilkie v. Santly Bros. Inc.*, 91 F. (2d) 978 (C. C. A. 2).

**The petition for a writ of certiorari should be denied.**

Dated: March 27, 1947.

Respectfully submitted,

SAMUEL J. SILVERMAN,  
*Attorney for Respondent.*

MARTIN KLEINBARD,  
*Of Counsel.*